In *Fullerton & Anor.* v. *Provincial Bank of Ireland*[6] the House of Lords had to construe some business letters in which the words "all you require is a little patience" appeared in one of the letters to Mr. Stuart, manager of the Bank. In construing these business letters Lord Macnaghten said that it was not necessary that there should be an arrangement for forbearance for any definite or particular time. It will be quite enough if the court can infer from the surrounding circumstances that there was an implied request for forbearance and that forbearance for a reasonable time was in fact granted. In *Fullerton* Lord Shand dealt with the second question there which was consideration. He said:

"As I gather from the letters there was pressure for the repayment of that debt. In answer to that pressure those letters were written which led to the forbearance of the bank, and I am of opinion that that is sufficient to meet the argument on the second point."

Let me summarise the evidence available against the appellants. The request for forbearance was clearly expressed in the letters to the Bank written by the 2nd and 5th appellants referred to earlier. Other than the 2nd and 5th appellants the other signatories to the No. 2 Account were the 3rd and 4th appellants. The signatories of the No. 2 Account must surely know that the new account was part of the solution to grant the Company time to pay off the existing liabilities of the Company. The 1st, 2nd and 6th appellants executed the first guarantee referred to earlier which was in relation to the existing liabilities and in respect of which action was withheld by the Bank.

The lawyer who prepared the documentation, Mr. Chandran (PW3) told the court that he met some of the Directors of the Company on July 29, 1977 and left the guarantee documents with the 5th appellant. When he returned on October 15, 1977 the document had already been signed. PW3 said that when he met the Directors of the Company they knew he was acting for the Bank and in fact PW1 was also with him at that time. PW3 said that no specific question was asked relating to the guarantee document and as far as he could remember none of the appellants indicated that they wanted to seek their solicitors' advice.

All the appellants are businessmen. The 5th appellant's letter dated May 4, 1977 referred to earlier was generous in its praise of the experience of the executive directors. Where the real consideration is forbearance to sue this consideration more often than not has to be implied from the nature of the transaction as between businessmen. As Bowen L.J. said in *Miles* v. *New Zealand Alford Estate Co.*[1]:

"We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between businessmen."

As regards the 6th appellant I do not think that the fact that he was no longer on the board when he executed the second guarantee could absolve him from liability. His resignation at the eleventh hour to escape the heat should not make him any less vulnerable than the other appellants.

Finally I might add that all the appellants chose not to give evidence after the close of the plaintiffs' case to throw some light on their defence.

On the evidence available the trial judge was, in my opinion, perfectly entitled to make the inference as he did that there was a request for forbearance and there was forbearance in fact.

I would accordingly dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; Krishna, Menon & Lee; Atma Singh Veriah & Co.; Shearn & Delamore.*

THE NEW STRAITS TIMES PRESS (M) BHD. v. AIRASIA BHD.

[S.C. (Abdul Hamid Ag. L.P., Seah & Syed Agil Barakbah S.C. JJ.) March 25 & May 29, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 342 of 1985]

Practice and Procedure – Interim injunction – Alleged defamatory statement – Articles in newspaper – Plea of justification and fair comment on matter of public interest – Right of free speech – Freedom of press – Court should be slow in issuing interim injunction in a libel action.

Libel and Slander – Injunction – Interlocutory injunction – Defendant pleading justification and fair comment.

In this case the respondent claimed damages against the appellants for libel alleged to be contained in articles published in the *Sunday Mail*. The appellants in their

defence raised the defences of justification and fair comment in the public interest. The respondent had applied for an injunction and by *ex parte* application applied for an interim injunction to restrain the appellants from publication of articles or words to the like effect. The learned judge gave an order in terms. The appellant applied to set aside the order. This was dismissed and the appellant appealed.

Held: the learned judge had erred in law when he exercised the power to grant the interlocutory injunction contrary to the established principle governing the issue of interim injunctions in libel actions. He should not have granted the injunction against a defendant who specifically pleaded justification and had raised as a defence fair comment on a matter of public interest.

Cases referred to:

(1) *Associated Leisure Ltd. (Phonographic Equipment Co. Ltd.)* v. *Associated Newspapers Ltd.* [1970] 2 Q.B. 450, 456.
(2) *Bonnard* v. *Perryman* [1891] 2 Ch. 269, 284.
(3) *Monson* v. *Tussauds Ltd.* [1894] 1 Q.B. 671.
(4) *Crest Homes Ltd.* v. *Ascott* [1980] F.S.R. 396.
(5) *Quartz Hill Consolidated Gold Mining* v. *Beall* (1882) 20 Ch. D. 501.
(6) *Fraser* v. *Evans & Ors.* [1969] 1 Q.B. 349.
(7) *American Cyanamid* v. *Ethicon Ltd.* [1975] A.C. 396.
(8) *Herbage* v. *Pressdram Ltd.* [1984] 1 W.L.R. 1160, 1162.
(9) *Harakas* v. *Baltic Exchange* [1982] 2 All E.R. 701, 703.

SUPREME COURT.

Robert Lazar for the appellant.

C.K. Leong for the respondent.

Cur. Adv. Vult.

Abdul Hamid Ag. L.P. (delivering the judgment of the Court): The respondent/plaintiff claims damages against the appellant/defendant for libel. The libel was alleged to be contained in an article headed "Danger in Model Job" and another article headed "Cops Check Model Job" published in two issues of *The Sunday Mail* dated April 14, 1985 and June 30, 1985 respectively.

The respondent also asks for an injunction to restrain the defendant from the publication of the articles or any of them or in words to the like effect.

On an *ex parte* application the respondent asked for an interim injunction pending hearing of the action substantially in the terms of the claim for an injunction as endorsed in the writ. The learned Judge gave an order in terms. The appellant then applied to set aside the order. It was dismissed. Hence the appeal.

After hearing the appeal we formed the view that the learned Judge had acted erroneously in the exercise of his judicial discretion when he granted the interim injunction. We therefore allowed the appeal with costs and set aside the order. We now give our reasons.

The pleadings referred to the two articles that were alleged to be libellous. As for the first article headlined "Danger in Model Job", the respondent alleges that the appellant falsely and maliciously wrote and published the article and meant and was understood to mean that the respondent was a disreputable and non-existent company and that its directors/employees were immoral, lewd and promiscuous people by seeking to offer employment to a girl with the intention of procuring her for immoral purposes. With reference to the second article headed "Cops Check Model Job", the respondent alleges that the appellant falsely and maliciously published the article and meant and was understood to mean that the respondent and/or its executives were elusive, shady and dangerous characters whom members of the public must be protected from.

The appellant admits publishing the articles but denies they were falsely and maliciously published. The appellant also denies that the articles complained of conveyed the meaning alluded to. In particular, the appellant asserts that the matters set out in the articles complained of are –

(a) in substance true in fact, and

(b) matters of comment upon a matter of public interest.

In support of these assertions particulars are set out in the defence. In support of (a), the appellant refers to the advertisement asking for applicants interested in working as models and film extras, the response of a schoolgirl to the advertisement, the offer by the respondent for work on unknown terms without interview, police investigation and so forth.

In support of (b), the appellant asserts that when someone offers lucrative jobs to young girls without job interviews through an advertisement for a job as a model it can have dangerous consequences and there could be something "fishy" going

on. Such assertions should, in our view, be sufficient to satisfy the Court that the appellant is specifically raising a defence of justification especially where the appellant is asserting that the words complained of were true in substance and in fact; (see *Associated Leisure Ltd. (Phonographic Equipment Co. Ltd.)* v. *Associated Newspapers Ltd.*[1]). The appellant is also raising a defence of fair comment. It is the appellant's case that the statements of fact on which comment is based are substantially true and are matters of public interest and therefore the comment on those facts is fair.

The question before the Court therefore is whether an injunction ought to have been granted by the learned Judge in a case where a defendant has specifically pleaded that he will rely on a well-recognised defence.

There is, in law, no doubt that "the High Court may grant an interlocutory injunction restraining the defendant, whether by himself or by his servants or agents or otherwise, from publishing or further publishing matter which is defamatory or of malicious falsehood. It is not necessary to show that there has already been an actionable publication or that damage has been sustained. In appropriate cases an injunction may be granted *ex parte* and before the issue of a writ." (*Halsbury's* Laws of England, 4th Edition, Vol.28,para 166).

However, in deciding whether or not to grant an interlocutory injunction the Court must exercise its discretion judicially. It is of cardinal importance to bear in mind that—:

"Because of the court's reluctance to fetter free speech and because the questions that arise during the proceedings, such as whether the meaning is defamatory, whether justification or fair comment are applicable and as to malice, are generally for the jury, interlocutory injunctions are granted less readily in defamation proceedings than in other matters and according to different principles." *Halsbury's* Laws of England, 4th Edition, Vol. 28, para 167. (See *Quartz Hill Consolidated Gold Mining* v. *Beall* (1882) 20 Ch.D. 501).

In *Bonnard* v. *Perryman*,[2] Lord Coleridge C.J. delivering the judgment of the Court in which Lord Esher M.R., and Lindley, Bowen and Lopes L.JJ. concurred, emphasised that:

"The right of free speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment. so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of, and desire to adopt as our own, the language of Lord Esher, M.R. in *Coulson* v. *Coulson* – 'To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable."

Bonnard's case and *Monson* v. *Tussauds Ltd.*[3] were followed in *Crest Homes Ltd.* v. *Ascott*,[4] where the trial Judge granted an interlocutory injunction against the defendant who said that he would justify his assertions. Allowing the appeal and discharging the injunction, the Court (C.A.) held:

"(1)There was no reason to depart from the general rule that an interlocutory injunction will not be granted against a defendant in a libel action if he intends to plead justification unless the plaintiff can prove that the statement is untrue; (2) The plaintiff had not shown that the defendant's statement was untrue."

Lord Justice Geoffrey Lane, sitting with Lord Denning M.R and Lord Justice Stephenson, stated that:

"the line of authority is long and weighty that interlocutory injunctions in these cases will not be granted unless the plaintiff shows that the defence of justification will not succeed."

Authorities do also show that the principle that there shall be no interim injunction if defence is raised "applies not only to the defence of justification" (*Bonnard* v. *Perryman*), "but also to the defence of privilege" (*Quartz Hill Consolidated Gold Mining* v. *Beall*[5]), and "fair comment" (*Fraser* v. *Evans & Ors.*[6]). "In accordance with the long established practice in defamation action, the principles enunciated by the House of Lords in *American Cyanamid* v. *Ethicon Ltd.*[7] relating to interim injunctions are not applicable in action for defamation. (*Herbage* v. *Pressdram Ltd.*[8])."

In our judgment the learned Judge had erred in law when he exercised the power to grant interlocutory injunction contrary to the established principle governing the issue of interim injunctions in libel actions. He should not therefore have granted the interim injunction against a defendant who has specifically pleaded justification and had

raised as a defence fair comment on a matter of public interest.

The principle has clearly emerged by reason of the fact that the questions of libel or no libel are eminently matters to be decided on facts at the trial and there is also the question of the proper meaning to be assigned to the words used in a particular statement. To restrain a defendant before the questions are determined would amount to fettering with free speech. Indeed it is because of the importance of leaving free speech unfettered that the Court must be slow in issuing interim injunction in a libel action.

In applying these principles, value is placed by the Court upon the freedom of speech which is related to the freedom of the press when balancing it against the reputation of a single individual who, if wronged, can be adequately compensated in damages. The Court should act cautiously in granting interim injunction to restrain publication of an alleged defamatory statement. In fact it should not grant the injunction where the defendant says he is going to justify it at the trial of the action except where the statement is obviously untruthful or where the plaintiff has satisfied the Court that the defence will fail. That was made clear by Denning M.R. in *Harakas* v. *Baltic Exchange.*[9]

It was for these reasons that we allowed the appeal with costs, and ordered that the order of the learned Judge be set aside.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.; C.K. Leong & Co.*

NKM HOLDINGS SDN. BHD. v. PAN MALAYSIA WOOD BHD.

[S.C. (Seah, Syed Agil Barakbah & Wan Hamzah S.C. JJ.) April 23 & June 24, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 277 of 1984]

Company Law – Winding up – Advertisement – Dispensation – Advertisement of winding up in Gazette a statutory requirement – Duty of Court – Companies (Winding-up) Rules 1972, r. 24(a).

Interpretation – Statute – Duty of the Court.

In this case the learned trial judge had exercised his discretion in dispensing with the advertisements either in the *Gazette* or in the newspapers of a new date for the hearing of a winding-up petition on the facts of the particular case ([1985] 2 M.L.J. 390). In his judgment the learned judge remarked that "the need to gazette has indeed deteriorated into a mere formality and in the face of the existence of widely circulated daily newspapers has perhaps become an anachronism." The appellants appealed.

Held (1) the learned judge had correctly exercised his discretion in dispensing with the advertisements;

(2) advertisement of a winding-up petition in the *Gazette* is a statutory requirement and deliberate non-compliance with this provision may result in adverse consequences;

(3) the duty of the Court and its only duty is to expound the language of the Act in accordance with the settled rules of construction. The Court has nothing to do with the policy of the Act which it may be called upon to interpret.

Cases referred to:

(1) *R.* v. *Hughes* (1866) L.R. 1. P.C. 81, 91.
(2) *Vacher & Sons* v. *London Society of Compositors* [1913] A.C. 107.

SUPREME COURT.

P.S. Ranjan for the appellant.
W.S.W. Davidson for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the Judgment of the Court): We dismissed the appeal as we were satisfied that the learned judge had properly exercised his discretion in dispensing with the advertisements either in the *Gazette* or in the newspapers of a new date for the hearing of a winding-up petition on the facts of this particular case. We would be content to rest the matter there had it not been for the fact that the learned judge spoke of the *Gazette* in language that might be wrongly interpreted. The learned judge said (at [1985] 2 M.L.J. 390, 391):

"I agree with Mr. Davidson that the need to gazette has indeed deteriorated into a mere formality and in the face of the existence of widely circulated daily newspapers has perhaps become an anachronism."

With respect to the learned judge, we are unable to agree with his view. Advertisement of a winding-up petition in the *Gazette* is a statutory requirement [see Rule 24(a) of the Companies (Winding-up) Rules 1972] and deliberate non-compliance with this provision may result in adverse consequences. It must always be borne in mind that we are Judges, not legislators. The